Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

Supreme Court of the United States

William Bernard Oertwig Jr.,
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
11th Circuit

PETITON FOR WRIT OF CERTIORARI

William Bernard Oertwig Jr.
Federal Prison Camp
63182-004
PMB 2000
Talladega, Alabama 35160

Questions Presented for Review

Whether the United States Court of Appeal for the 11th Circuit ruled correctly when it evaded issues under appeal, misspoke, assumed facts not in evidence, and ignored holdings of this Court and other Appeals Courts?

Whether the United States Court of Appeals for the 11th Circuit Court ruled correctly when it did not find evidence on the record of a statute that imposes a tax, a statute that provides for payment of the tax imposed, prerequisites to a penalty statute being imposed on those proved to have a known legal duty to pay a tax and failed to do so?

Whether the United States Court of Appeals for the 11th Circuit ruled correctly when it did not find evidence on the record of a procedurally proper, lawful tax assessment, a prerequisite to determine a tax deficiency?

CERTIFICATE OF INTERESTED PARTIES

I, the Petitioner, William Bernard Oertwig Jr., state that the following parties may have an interest in outcome of this case:

TJOFLAT, ANDERSON, AND WILSON, Circuit Judges, United States Court of Appeals for the 11th Circuit;

James I. Cohn, District Court Judge, Southern District of Florida;

Anita Jane Gay, Assistant United States Attorney;

Jeffery A. Neiman, U. S. Department of Justice Tax Division, Trial Attorney;

William Bernard Oertwig, Jr., Petitioner;

UNITED STATES OF AMERICA, Respondent;

There is no parent or publicly held company owning 10% or more of a corporation's stock party to this Petition.

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STATEMENT OF JURISDICTION

Jurisdiction is derived pursuant to an Order issued by the United States Court of Appeals for the 11th Circuit (hereafter 11th Circuit Court of Appeals) affirming the lower court's Judgment in a Criminal Case under 26 U.S.C. § 7201 issued by James I. Cohn, District Judge, Southern District to Florida on January 29, 2004 and filed by the court clerk on February 3, 2004.

This Court has jurisdiction under either one or more of the following: 28 U.S.C. § 1651 and 5 U.S.C. §§ 702, 706.

Oertwig filed the Notice of Appeal within the time allowed by law, rule, or both. This Petition is timely filed after his Petition for a Rehearing En Banc, which was denied on February 6, 2005 by the 11th Circuit Court of Appeal.

STATEMENT OF INCARCERATION

Statement of incarceration: Oertwig is incarcerated in the Federal Prison Camp, Talladega, Alabama 35160

Statement of Facts

This is a Petition for Writ of Certiorari of the Order of the 11th Circuit Court of Appeals affirming the ruling from the United States District Court for the Southern District of Florida where Oertwig was sentenced to 41 months of incarceration from a jury verdict of guilty on a six count violation of 26 U.S.C. § 7201. Conviction arose out of allegations that Oertwig did willfully evaded and defeat a tax imposed.

Standards of review presented to the 11th Court of Appeals are as follows:

Whether the action by the agency is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A);

Whether the action by the agency is "contrary to a constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B);

Whether the action of the agency is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C);

Whether the action by the agency is "without procedure required by law." 5 U.S.C. § 706(2)(D);

SUMMARY OF THE ARGUMENT

The crux of the argument is: The prosecution has the burden of proof and the 11th Circuit Court of Appeals did not find the required elements necessary to prove a tax evasion offense under 26 U.S.C. § 7201 is evidenced on the record.

The agency prosecuted this action lacking evidence on the record that proves Oertwig has now or ever had a known legal duty to pay a tax.

Black's Law Dictionary, Revised Fourth Edition (1968) at page 1039 thereof, defines the term "legal duty" as: "An obligation arising from contract of the parties or the operation of law."

Title 26 U.S.C., the Internal Revenue Code, and its associated agency's statutory authority is only over those persons proved by conclusion of law and findings of fact to be made liable for a tax lawfully and legally imposed by statute.

The 11th Circuit Court of Appeals made it's holding contrary to evidence, evaded issues on appeal, misspoke, assumed facts not in evidence, disregarded holdings of this Court, and other United States Court of Appeals. Therefore, the 11th Circuit Court of Appeal erred and its Order must be reversed.

JUDICIAL NOTICE

In accord with Federal Rules of Evidence 201, the Court will take judicial notice of the following:

(a) the indictment alleges that William Bernard Oertwig Jr. (hereafter Oertwig) violated 26 U.S.C. § 7201 by reason that he did willfully attempt to evade and defeat a substantial part of the income tax due and owing by him to the United States of America for the calendar years 1996, 1997, 1998, 1999, 2000, and 2001;

(b) there is no evidence on the record of a statute that imposes a tax;

(c) there is no evidence on the record of a statute that provides for payment of a tax.
(d) there is no evidence on the record of a substantive regulation;
(e) the only statute evidenced on the record is 26 U.S.C. § 7201, a penalty statute that can be effected only on persons that are proved on the record to have a "known legal duty" to pay a tax imposed and willfully failed to pay the tax;
(f) there is no evidence on the record of a procedurally proper, lawful assessment, which is a condition precedent to establishing a deficiency;
(f) there is no evidence on the record that Oertwig has now or ever had the status of a taxpayer or withholding agent as those terms relates to the internal revenue laws of the United States;
(g) the court cites and other Authorities presented herein;
(h) the indictment initiated in this instant matter;
(i) Government's Trial Brief;

ARGUMENT

Oertwig re-alleges and incorporates the preceding paragraphs.

The indictment alleges that Oertwig violated 26 U.S.C. § 7201 by reason that he did willfully attempt to evade and defeat a substantial part of the income tax due and owing by him to the United States of America for the calendar years 1996, 1997, 1998, 1999, 2000, and 2001.

Title 26 U.S.C. § 7201 is a statute that makes it a felony for willful failure to pay a tax imposed. The word imposed, past tense of impose, used in § 7201 concludes that the penalty set out in § 7201 is predicated on a statute that imposes a tax and can be effected only on those persons proved to have a known legal duty to pay a tax and fails to do so.

The legal responsibility for a tax must be made by statute. The Government even admits this requirement in their Brief of Appellee when they relied on the holding of

the court in *United States v. Silkman*, 156 F.3d 833 (8th Cir. 1987). The court held that the government must prove that the tax was in fact "imposed by this title [Title 26 U.S.C.]."

Defendant must be given adequate notice of the offense charged against him and for which he is to be tried. *Smith v. O'Grady*, 312 U.S. 329 (1941) and, "Conviction upon a charge not made would be sheer denial of due process." *De Jonge v. Oregon*, 299 U.S. 353, 362. (1937). In *United States of America v. Community TV, Inc.*, 327 F.2d 797 (10th Cir., 1964) the court held that "[w]ithout question, a taxing statute must describe with some certainty the transaction, service or object to be taxed...". *Hassett v. Welch*, 30 US 303, 58 S. Ct. 559, 82 L. Ed 858 (1938). Title 26 U.S.C. § 7201 does not imposes a tax. Section 7201 establishes a penalty that can be imposed on those made liable for a tax and who willfully failed to pay the tax. In *UNITED STATES OF AMERICA v. KUGLIN*, CASE #: 03-CR-20111-ALL, U.S.D.C. Western District of Tennessee (Memphis) (March 23 2003), the jury found Kuglin not guilty of all charges because no tax liability statute was evidenced. The court, in *United States v. Menk*, 260 F.Supp. 784 (1966) (USDC Terra Haute Division), in upholding a conviction, held that there must be a "... section that imposes a tax on persons engaging in a certain activity..." and a section that "... provides the payment of the tax shall be a condition precedent to engaging in the activity subject to the tax...' and a section that "... makes it a misdemeanor [felony] to engage in the activity without having first paid the tax, and provide for the penalty." Without reference to these elements collectively "...it is impossible to determine the intended effect of any one section...." It can be understood and concluded from the holdings of the above courts that a lacking of any one or more required elements would result in overturning a conviction.

Though the courts in *Menk, Community T.V.*, or Hassett, supra, did not address substantive regulations, a substantive regulation shall be prescribed and published in the Federal Register in accord with the Administrative

Procedures Act, 5 U.S.C. § 552(a)(1), the Federal Registry Act, 44 U.S.C. § 1501 et seq., and the Internal Revenue Code, 26 U.S.C. § 7805 before the Secretary can enforce Title 26 U.S.C.

This Court held in *United States v. Mersky*, 361 U.S. 431 (1960), that any claim absent these regulations does not have the force and effect of law. See also, *California Bankers Association v. Schultz*, 416 U.S. 21 (1974); *U.S. v. Murphy*, 809 F.2d 1427 at 1430 (9th Cir. 1987): *U.S. v. Reines*, 794 F.2d 506 at 508 (9th Cir. 1986). See also *Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208. In particular, this Court in *Mersky*, supra, articulates that statute and implementing regulation must operate together before there is any force of law:

> "Once promulgated, these regulations, called for by the statute itself, have the force of law, and violations therefore incur criminal prosecutions, just as if all the details had been incorporated into the congressional language. The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force."

Both 26 U.S.C. § 7805 and its regulation, 26 C.F.R. § 301.7805-1, clearly state that prescribed rules and regulations are required for the enforcement of Title 26 U.S.C. From authorities of the courts presented in *Mersky, Chrysler, California Bankers Association, Murphy, Reines, Menk, Community TV,* and *Hassett,* supra, 5 U.S.C. § 552(a)(1), 44 U.S.C. § 1501 et seq., 26 U.S.C. § 7805, the Code of Federal Regulations, 26 CFR § 301-7805-1, and there being no evidence on the record of the required elements necessary to establish a tax is "due and owing" and that Oertwig had a known legal duty to pay a tax, the agency could not, cannot and did not lawfully and legally charge a penalty as stated in 26 U.S.C. § 7201.

The only person with statutory authority to assess a tax is the Secretary or his delegate. See n8 in *Girard,* infra; 26 U.S.C. § 6201. Therefore, it is axiomatic that Oertwig does

not have statutory authority to assess or establish himself as either a "Person", "Taxpayer", or lawfully and legally declare himself to have known legal duty to pay a tax that is "due and owing."

Since the 11th Circuit Court of Appeal did not find the prerequisite elements necessary to prove a tax is "due and owing" are evidenced on the record, the agency could not, cannot, and did not lawfully and legally establish or prove any of the following:

1) that Oertwig has the status of "person" clearly and exclusively defined at 26 U.S.C. § 7343;

2) that Oertwig has the status of "taxpayer" as that term is used in the internal revenue laws of the United States;

3) that Oertwig is a Trustee of a "trust fund for taxes" per 26 U.S.C. § 7501.

4) that Oertwig did assess himself;

5) that a procedurally proper a lawful tax assessment is made (a prerequisite to a tax deficiency). Until such time that a procedurally proper, lawful assessment is made, there is no tax "due and owing" and the status of "taxpayer" does not exist a. See *Radinsky v. United States*, 622 F.Supp. 412 at 413 (U.S.D.C., D.Colo. 1985); *Girard Trust Bank v. United States*, 643 F.2d 725 (Ct. Cl. 1981); *In Re Western Trading Co*, F.Supp. 1130 at 1133 (U.S.D.C., D. Nevada 1972); *Estate of Goetz v. United States*, 286 F.Supp. 128 (U.S.D.C.,W.D. Missouri 1968); *Brafman v. United States*, 384 F.2d 863 (5th Cir. 1967); and the agency has no statutory authority over a non-taxpayer. See *Economy Plumbing & Heating v. U.S.*, 470 F.2d. 585 at 589 (Ct. Cl. 1972);

6) that Oertwig filed a petition in a tax court, therefore acquiescing to or assuming the status of "taxpayer." Oertwig filed no petition in the non-judicial court. Therefore, he did not inherently assume the jurisdiction of the "court" and the legal position of a taxpayer. See. *Lively v. CIR*, 705 F.2d 1017 (8th Cir., 1983); *Ficalora v. CIR*, 751 F.2d 85 (2nd Cir., 1983); *Charczuk v. CIR*, 771 F.2d 471 (10th Cir., 1985).

In *Boyd v. US*, 116 U.S. 616 (1886), this Court observed the succinct statement by Lord Camden: "If it is law, it will be found in our books; if it is not to be found there, it is not law." This Court addresses the issue of lack of a statute averring a lawful and legal liability in *Smith v. U.S.*, 360 U.S. 1 (1959). This Court held that the constitutional right to an indictment, as restated in Federal Rule of Criminal Procedure 7(a), could not be waived by the defendant and that a proceeding in violation of this constitutional requirement negated the jurisdiction of the court. (This Court could not have returned the case for a new trial if jeopardy had attached in the first trial.)

The constitutional right to be left alone unless charged with violating a law (the essence of due process) is no less a constitutional right than being indicted for an infamous crime. Criminal process must allege every essential element of the offense. *Evans v. U.S.*, 153 U.S. 584 (1894); *Hagner v. U.S.*, 285 U.S. 427 (1932); *Hamling v. U.S.*, 418 U.S. 87 (1974). Notification of legal responsibility is "the first essential of due process of law" and "(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). In reversing a conviction, this Court stated in *Vachon v. New Hampshire*, 414 U.S. 478 (1974) "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process." Therefore, the "as required by law" phrase in the indictment is unfounded in law and fact, arbitrary, and capricious assumption presented by the Respondent that is unacceptable in criminal process. It is a violation of due process of law, United States Constitution Fifth Amendment, if one has to guess what law makes him liable for a tax.

Furthermore, there is no evidence on the record of any jurisdiction statement of the trial court made and

submitted by the prosecution. *Hagans v. Lavine*, 415 US 528 (1974) (the law requires proof of jurisdiction to appear on the record of the administrative agency and all administrative proceedings). If the tribunal finds absence of proof of jurisdiction over person and subject matter, the case must be dismissed. *Louisville R. R. v. Mottley*, 211 US 149 (1908).

Except as provided by statute, the proponent of a rule or order has the burden of proof. Title 5 U.S.C. §§ 556(d) & (e). There is no rule of presumption in a criminal action. See Federal Rules of Evidence 301.

CONCLUSION

Elements necessary to convict must be evidenced on the record before it can be proved that (1) acts of Oertwig were willful, (2) there is a deficiency, and (3) Oertwig did any affirmative act constituting an evasion or attempted evasion of a tax imposed.

The requirements presented in the preceding argument and in Oertwig's Appeal Brief and Reply Brief, are fundamental requirements of due process. However, the 11th Circuit Court of Appeal did not address them. "A judgment rendered in violation of due process is void..." *World Wide Volkswagen v. Woodsen*, 444 U.S. 286, 291 (1980); National Bank v. Wiley, 195 U.S. 257 (1904); *Pennoyer v. Neff*, 95 U.S. 714 (1878). Unsworn statements made by counsel or otherwise are not facts before the court and cannot be considered in the disposition of the case in the lower court or ... argument in the appeals process. See *United States v. Lovasco*, 431 U.S. 783 (1977); *Gonzalez v. Buist*, 224 U.S. 126 (1912); *Holt v. United States*, 218 US 245 (1910).

The 11th Circuit Court of Appeals ruled in error because they did not find evidence on the record of the fundamental, perquisite elements necessary to prove a tax is "due and owing" and that Oertwig is a person to have a

known legal duty to pay a tax. The required elements cannot legally and lawfully be presumed to exist.

This Court should order the Writ of Certiorari, reverse the Order of the 11th Circuit Court of Appeal, vacate the judgment entered by the court of the United States District Court of the Southern District of Florida, find the agency's acts were outside their statutory authority, and immediately release Oertwig from incarceration.

William Bernard Oertwig Jr.